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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-5341

ROBERT W. CHURCH,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Mississippi

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INDEX

	Page
Citations to Opinions Below	1
Jurisdictional Statement	2
Question Presented	2
Statute and Constitutional Provisions Invoked	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	6
Appendix:	
Opinion of the Supreme Court of Mississippi	A-1
Motion for Stay Pending Appeal to U.S. Supreme Court	A-4
Order Approving Stay and Setting Bond Pending Appeal	A-6
Mississippi Code 1972, Section 97-17-69	A-7
Fourteenth Amendment U.S. Constitution	A-7
Title 28, U.S.C. 1257 (3)	A-7

Cases Cited

Daniel v. State (1951 Miss.), 54 So. 2d 272	4
Garner v. Louisiana, 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961)	4
Thompson v. City of Louisville, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654 (1960)	4
Young v. Alexander (1920 Miss.), 86 So. 461, 123 Miss. 708	4

Other Authorities

76 C.J.S. 8 §6, Receiving Stolen Goods 4

76 C.J.S. 9 5

28 U.S.C., Section 1257 (3) 2, 5

U.S. Constitution, Fourteenth Amendment 2, 4, 5

Miss. Code 1972, Sec. 97-17-69 2

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Mississippi

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Mississippi, entered in the above entitled cause on July 14, 1975.

CITATION TO OPINION BELOW

The Opinion of the Supreme Court of Mississippi is reported in 317 So. 2d 386 and appears as Appendix A to this Petition on Page A-1.

JURISDICTIONAL STATEMENT

The Opinion and Affirmation of the Supreme Court of Mississippi was rendered on July 14, 1975 and the Petition for Certiorari was filed less than 90 days from the date aforesaid.

The jurisdiction of the Supreme Court of The United States is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

The single question presented in this petition is:

1

Was the action of the Supreme Court of Mississippi in affirming the conviction of Petitioner on a charge for receiving stolen property totally devoid of evidentiary support as to render his conviction unconstitutional under the due process clause of the fourteenth amendment?

STATUTE AND CONSTITUTIONAL PROVISIONS INVOKED

The State statutory provision involved is Section 97-17-69 Mississippi Code 1972 which is printed in Appendix A hereto at page A-7, 28 U.S.C., Section 1257(3) which is printed in Appendix A hereto at page A-7 and Amendment XIV, Section 1 of the Constitution of the United States which is printed in Appendix A hereto at page A-7.

STATEMENT OF THE CASE

Petitioner was separately tried and convicted by a jury in the Circuit Court of Neshoba County, Mississippi, wherein he was charged, in conjunction with others, of receiving stolen

property consisting of several pairs of western type boots identified as having been removed from a rural store at or shortly before the store building was destroyed by fire.

At the conclusion of the testimony offered by the state the petitioner made a motion for a directed verdict of not guilty as the evidence was insufficient to sustain a conviction, which was overruled. Petitioner rested without offering any testimony and the case was submitted without further evidence.

The record reveals that the only evidence adduced by the State to substantiate the charge against petitioner of receiving stolen property was that at sometime subsequent to the fire petitioner negotiated with one Jones for the sale of said property and delivery thereof by other parties who in fact had actual possession of the allegedly stolen merchandise.

The state completely failed to produce any evidence, directly or indirectly, indicating that Petitioner ever received the property, or that he at any time had manual or physical possession thereof, nor is there any evidence that he had dominion or control over such property.

The trial court openly stated that "There isn't any testimony in this record that this defendant ever had physical possession of this allegedly stolen merchandise. . . ." (TR. 73)

The Supreme Court of Mississippi agreed that in order to sustain a conviction for receiving stolen property, the accused must have control and dominion over the stolen property. The State Supreme Court so stated, "We agree with this postulate, and we also agree that the crime is not committed until the stolen property is received by the accused." Appendix A, page A-2. Nevertheless, the Supreme Court of Mississippi affirmed the conviction on the basis that the acts and statements of the petitioner in negotiating the sale and delivery of the property was sufficient to establish the charge of receiving the stolen goods.

REASONS FOR GRANTING THE WRIT

Not only is the decision of the Supreme Court of Mississippi unconstitutional under the due process clause of the Fourteenth Amendment but it is also in conflict with its own former decisions.

It is settled law that where the charge against a defendant is totally devoid of evidentiary support his conviction is unconstitutional under the due process clause of the Fourteenth Amendment. Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L. Ed. 2d 654 (1960); Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961). A conviction denies due process on ground of insufficient evidence only where charge is totally devoid of evidentiary support.

The decision conflicts with the previous decision of the Supreme Court of Mississippi in Young v. Alexander (1920), 86 So. 461, 123 Miss. 708 wherein the Court held that the word "receive" means to take into possession and control and to accept custody thereof.

The decision is also contrary to the Court's previous holding in Daniel v. State (1951), 54 So. 2d 272, 212 Miss. 223, wherein the Court held that in order to sustain a conviction for receiving stolen property, the defendant must be shown to have had control over the property.

It is an essential element of the offense that accused should have actually received the goods according as the local statute may provide: if the accused knows, before or at the time of receiving the goods, that they have been stolen, the crime of receiving or possession stolen property is not committed until the property is received by him. 76 C.J.S. 8, Receiving Stolen Goods, No. 6.

While the actual, physical, or manual possession of the goods by the accused is not necessary, constructive possession or control is necessary. That the act of receiving must have been consummated and not be inchoate. In any event the least constructive or potential possession or control must be shown. 76 C.J.S., 9, Receiving Stolen Goods.

In reviewing the sufficiency of the evidence a guilty verdict will be sustained if there is substantial evidence, taking the view most favorable to the government to support it.

"Substantial evidence," in this context means evidence that a reasonably minded jury could accept as adequate and sufficient to support the conclusion of defendant's guilt beyond a reasonable doubt.

The charges against this petitioner for receiving stolen property were so totally devoid of evidentiary support as to render his conviction unconstitutional under the due process clause of the Fourteenth Amendment. If the evidence fails to prove the essential elements of control, dominion or possession of the property, the conviction is not supported by the evidence, in which event it does not comport with due process of law.

For the Supreme Court of the United States to be authorized to take jurisdiction and review this decision by certiorari, it seems that it is enough that the right, privilege or immunity under federal law be asserted defensively and that, as here, the State Court's decision passes upon federal rights which have been infringed by the State Court's decision.

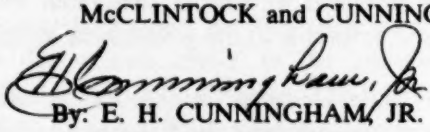
It seems therefore, that the decision, by the Supreme Court of Mississippi, is a final judgment, based solely on a federal ground and incorrectly decides those federal rights and this Court has power to correct this wrong judgment under the provisions of 28 U.S.C. Section 1257 (3).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted

BARNETT, MONTGOMERY,
McCLINTOCK and CUNNINGHAM

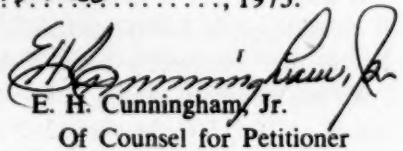


By: E. H. CUNNINGHAM, JR.
315-21 Barnett Building
Jackson, Mississippi 39205
Of Counsel for Petitioner

Certificate of Service

I, E. H. Cunningham, Jr., solicitor for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the date shown below, I served the foregoing Petition for a Writ of Certiorari to the Supreme Court of Mississippi on Honorable A. F. Summer, Attorney General of the State of Mississippi, Carrol Gartin Justice Building, Jackson, Mississippi, by mailing by United States Mail, postage fully prepaid, a true and correct copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Mississippi.

This the 3. day of October, 1975.



E. H. Cunningham, Jr.
Of Counsel for Petitioner

APPENDIX

APPENDIX "A"

In the Supreme Court of Mississippi

No. 48,614

Robert Church

v.

State of Mississippi

Before Rodgers, Robertson and Broom

Rodgers, Presiding Justice, for the Court:

Robert Church was indicted, tried and convicted in the Circuit Court of Neshoba County, Mississippi, for the crime of receiving stolen property. He was sentenced to serve five (5) years in the state penitentiary.

The defendant requested the trial court to direct a verdict in favor of the defendant at the conclusion of the testimony offered by the state. This motion was overruled and the defendant rested without offering any testimony.

The sole issue presented on appeal is whether or not the testimony offered by the state was sufficient to show that the defendant had actual possession of the stolen goods.

The testimony reveals that the appellant called the witness Joe Lee Jones and advised him that he had some boots he wanted to sell him for five dollars ($5.00) a pair. He later went to the home of Jones and advised him that he would have the boots brought to him after dark. Later, appellant called the witness and advised him that the boots were on the way; that he had arranged for J. D. Ladd and Percy McCul-

lough to deliver the boots. The boots were delivered by the two named persons. Mr. Jones agreed to count the boots and pay for them the next day. Mr. Jones notified the sheriff that he had the boots.

The evidence further revealed that the Triple D Western Store had been burglarized and burned, that prior to the delivery of the boots the sheriff had been to the home of Joe Lee Jones, and as he left he passed and spoke to Robert Church. Later he was notified that the merchandise had arrived at the home of Joe Lee Jones. The boots were identified as the merchandise stolen from the Triple D Western Store. Were these facts sufficient to show possession of stolen property?

The appellant in a carefully written brief points out that in order to sustain a conviction for receiving stolen property, the accused must have control or dominion over the property stolen. He cites *Daniel v. State*, 212 Miss. 223, 54 So. 2d 272 (1951). We agree with this postulate, and we also agree that the crime is not committed until the stolen property is received by the accused. 76 C.J.S. *Receiving Stolen Goods* § 6, at 8 (1952).

On the other hand, it is not necessary for the state to show that the accused actually manually held the stolen property. Constructive possession of stolen goods is sufficient to satisfy the essential element of having "received" the goods.

It is said in 66 Am.Jur.2d *Receiving Stolen Goods* §5, at 298 (1973), as follows:

> "It is not necessary that there be a manual possession or touching of the stolen goods; exercising any control or dominion over them is sufficient to constitute a receiving. But the buying, receiving, or aiding in concealment of stolen property, knowing it to have been stolen, is not es-

> tablished by mere possession of such property. One is guilty of so receiving as soon as he obtains a measure of control or dominion over the custody of the goods; such receiving may be by an agent or through the instrumentality of another; nor is it necessary that the accused should have actually seen the goods."

The text writer in 76 C.J.S. *Receiving Stolen Goods* §6(b), at 9 (1962), has the following to say on this subject:

> "He has such constructive possession where the goods are in the possession of someone over whom he has for the time being direction and control, such as his authorized servants or agents, or the thief himself, so that the goods will be forthcoming when he orders, and also where by his direction the goods are deposited in a place subject to his control, or where they are concealed on his premises by others with his knowledge or consent."

We are of the opinion that the acts and statements of the appellant in this case are sufficient to establish the charge that he received the stolen goods. The judgment of the trial court must be affirmed.

Affirmed.

Gillespie, C.J., Patterson, Inzer, Smith, Sugg, and Walker, JJ., Concur.

In the

Supreme Court of the State of Mississippi

Robert W. Church

Appellant

vs. No. 48,614

State of Mississippi

Appellee

Motion for Stay of Mandate and Approval of Bond On Appeal to the Supreme Court of the United States

To the Honorable Supreme Court of Mississippi

Now Comes Robert Church, appellant, and moves this Honorable Court to stay the issuance and delivery to the Clerk of the Circuit Court of Neshoba County, Mississippi, of the mandate herein of this court pursuant to the decision and judgment of this court entered on July 14, 1975, affirming the judgment and conviction of appellant in the Circuit Court of Neshoba County, Mississippi, and to fix and approve a bond pending appeal to the Supreme Court of the United States and in support hereof respectfully shows the following:

That the judgment of this court of July 14, 1975, became final on said date subject to an appeal to the Supreme Court of the United States within 90 days from the date thereof.

That formal notice of appeal is this July 30, 1975, filed herein under and pursuant to the rules of the Supreme Court of the United States with proper service on appellee, reference thereto made in aid of this motion.

Wherefore appellant now offering to prepay all costs herein and to do as this Honorable Court may direct in the premises prays that this motion be sustained.

Respectfully submitted

ROBERT CHURCH, Appellant

By: BARNETT, MONTGOMERY,
McCLINTOCK & CUNNINGHAM
315-21 Barnett Building
Jackson, Mississippi
Attorneys for Appellant

By: /s/ E. H. CUNNINGHAM, JR.
Of Counsel

Certificate of Service

I, E. H. Cunningham, Jr., of counsel of record for Robert Church, appellant herein, certify that I have this day personally delivered to Honorable A. F. Summers, Attorney General of the State of Mississippi, a true and correct copy of the foregoing Motion for Stay of Mandate and Approval of Bond on Appeal to the Supreme Court of the United States.

Witness my Signature this July 30, 1975.

/s/ E. H. Cunningham, Jr.

In the Supreme Court of the State of Mississippi

Robert W. Church,

Appellant,

vs. No. 48,614

State of Mississippi,

Appellee.

Order Granting Stay of Mandate and Approval of Bond Appeal to the Supreme Court of the United States

This Day motion having been made by appellant for a stay of the issuance of the mandate affirming the sentence and judgment of appellant pending appeal to the Supreme Court of the United States and for fixing the amount of an appearance bond pending such appeal, the court having considered same is of the opinion that said motion should be sustained.

It Is, Therefore, Ordered and Adjudged that the issuance of the mandate herein to the Circuit Clerk of Neshoba County, Mississippi, in this cause be stayed pending an appeal to the Supreme Court of the United States within 90 days from this date.

It is Further Ordered and Adjudged that a good and sufficient appearance bond in the sum of $10,000.00 conditioned according to law, be filed and approved by the Clerk of this Court pending said appeal.

So Ordered and Adjudged this July 30, 1975.

J. Henry Rodgers
Justice of the Supreme Court of
the State of Mississippi

Mississippi Code 1972

§ 97-17-69. Receiving stolen property.

If a person buy or receive in any manner or on any consideration personal property of any value, feloniously taken away from another, knowing the same to have been so taken, he shall be guilty of receiving stolen goods, and, on conviction, shall be punished by imprisonment in the penitentiary not more than five years, or by imprisonment in the county jail not more than six months, and by fine, nor more than two hundred and fifty dollars.

Sources: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4 (72); 1857, ch. 64, art. 196; 1871, § 2657; 1880, § 2907; 1892, § 1181; 1906, § 1259; Hemingway's 1917, § 989; 1930, § 1017; 1942, § 2249.

Amendment XIV, Section 1 to United States Constitution.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U. S., Section 1257(3).

§ 1257 STATE COURTS: APPEAL: CERTIORARI.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.